IN THE COURT OF APPEALS OF IOWA

No. 0-290 / 09-1504
Filed June 30, 2010

IN THE MATTER OF THE ESTATE OF
RONALD EDWIN PROSSER, Deceased

VINCENT PROSSER,
Petitioner-Appellant.

Appeal from the Iowa District Court for Johnson County, Marsha A. Bergan, Judge.

Decedent's son appeals from the district court's construction of his father's will. **REVERSED AND REMANDED.**

Paul P. Morf and Webb L. Wassmer of Simmons Perrine Moyer Bergman, P.L.C., Cedar Rapids, for appellant.

Steven E. Ballard of Leff Law Firm, L.L.P., Iowa City, for appellee.

Heard by Sackett, C.J., and Eisenhauer and Mansfield, JJ.

SACKETT, C.J.

Vincent Prosser, the son of decedent Ronald Prosser, appeals contending that the district court erred in construing decedent's will and determining that an Iowa Public Employees Retirement System (IPERS) account decedent had at his death was a part of Ronald's residuary estate that went to Ronald's mother and brothers. We reverse and remand.

BACKGROUND AND PROCEEDINGS. Ronald died testate on May 27, 2008, survived by his son Vincent. Ronald executed a will determined to be his last will on July 2, 1999. The first two sections of the will provided for the payment of his debts and the expenses of his last illness and disposal of his remains. It also included a paragraph indicating his intention to prepare a written list disposing of items of tangible personal property not otherwise disposed of by the will, pursuant to Iowa Code Section 633.276 (1999).

The dispute centers on Paragraph III of the will, which provides:

> All property of every kind and description, wherever located, real or personal, not disposed of by the previous provisions of this Will, shall be converted to cash in a method deemed most appropriate by my Executor. The proceeds from said conversion shall first be used to defray the expenses for the party outlined in the following Paragraph IV.[1] Having adequately provided for my son, Vincent Christopher Prosser, through the insurance policy covering me as an Iowa City public employee,[2] my TIAA/CREF account,[3] IPERS

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[1] Decedent indicated there he did not want a religious ceremony but a party that his executor was to have absolute authority to plan and do it up in style and to invite friends, relatives, acquaintances, or strangers off the street. He further instructed that "Goodbye Cruel World I'm Off to Join the Circus" be played at some point in the festivities.

[2] Vincent was named the primary beneficiary on June 29, 1993, on a group policy with the City of Iowa City. The policy was terminated when Ronald retired.

[3] Vincent was designated beneficiary on this account in 1967.

> account, and personal retirement fund,[4] the balance thereof remaining after the expenses of said party are paid shall be divided in the following manner.
> A. One half (1/2) thereof shall be distributed to my mother, Betty Jean Prosser, of Clearbrook, Minnesota. In the event she predeceases me, this amount shall be divided between my brothers, Gary Jon Prosser and Kevin Devo Prosser, or their descendants, per stirpes.
> B. One-half (1/2) shall be divided equally between my brothers Gary Jon Prosser and Devin Devo Prosser, or, if either or both should predecease me, between their descendants, per stirpes.

At death, Ronald had an IPERS account with a survivor benefit in excess of $58,550.24. On June 8, 1992, prior to executing the will, Ronald designated "My Estate" as the beneficiary of the account.[5] On November 7, 2007, after the execution of the will, Ronald again designated "My Estate" as the beneficiary of the IPERS account. The IPERS account was paid to Ronald's estate.

On October 10, 2008, Vincent filed a petition for declaratory judgment asking the court to construe Ronald's will to find that he was entitled to receive the IPERS account and any personal retirement funds that may exist. The estate responded, contending that the IPERS account was correctly paid to the estate. Vincent filed a motion for summary judgment and the estate filed a resistance. The court considered the motion for summary judgment on the file and written arguments. The court denied the motion finding "there is a patent ambiguity regarding the use of the phrase 'adequately provided' in Ronald's will and that a

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[4] Vincent originally made claim to the personal retirement funds but subsequently withdrew that claim. In doing so, he specifically did not withdraw the claim to the IPERS account.

[5] Iowa Code 97B.44 provides as to designation of beneficiary of an IPERS account in relevant part:

> Each member shall designate on a form to be furnished by the system a beneficiary for death benefits payable under this chapter on the death of the member. . . . The designation may be changed from time to time.

trier of fact should be given the opportunity to consider extrinsic evidence to determine whether Ronald intended to leave Vincent his IPERS benefits."

The matter came on for hearing. The court heard the testimony of Vincent, Jay Stein, and Karen Jennings.

Vincent testified he was born in 1967, Ronald was his father, Ronald named him the beneficiary on his TIAA/CRRF account, and he received $41,838.53 from that account when his father died. He also testified he lived most of his life in Iowa City but was away for a short time before moving back to Iowa City in the fall of 1998.

Stein, a long time friend of decedent, testified that prior to decedent's death the two of them spent time together socially, seeing each other at least weekly. He further testified that decedent complained about Vincent. When asked if he had knowledge of decedent's state of mind when he signed his will in 1999 he answered "no."

Jennings, the personnel administrator for the City of Iowa City, for whom decedent had worked, testified as to information given decedent when he retired about six months prior to his death. She further identified a number of exhibits given to decedent that provided information about IPERS and others that decedent signed.

Following the hearing the district court found Vincent had not met his burden of proof to establish he was entitled to receive the IPERS account funds. The court found:

> [T]he will was not ambiguous and its language, particularly the phrase "having adequately provided for my son," indicated decedent intended to provide for Vincent outside the scheme of distribution set forth in the Will. Decedent did not specify anywhere in the Will that it was his intent for Vincent to receive the IPERS account funds. Moreover, on two separate occasions, Decedent designated "My estate" as the beneficiary of his IPERS account funds. It is clear Decedent understood how to make beneficiary designations, as he actually designated Vincent as beneficiary of two other sources of funds. If Decedent had intended for Vincent to receive the IPERS funds, Decedent could have said so in the Will and the IPERS beneficiary designation forms. Decedent clearly intended for the beneficiaries of his Estate, his mother and his brother, to receive the proceeds of the Estate including IPERS funds.
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> Even if the language in the Will regarding the IPERS account is ambiguous, and if the Court is required to consider extrinsic testimony regarding Decedent's intention for the distribution of his Estate, the testimony received at trial establishes that Decedent did not believe Vincent was capable of managing large sums of money, and the IPERS account funds were the largest cash asset of the Estate. The evidence of the relationship between Vincent and Decedent supports a conclusion that Decedent would not have intended to leave such a large bequest to Vincent. The history of beneficiary designations made by Decedent also is helpful on this issue, since the history shows that Decedent clearly knew how to designate Vincent as a beneficiary yet chose not to do so on his IPERS beneficiary designation forms.

Vincent on appeal contends (1) the district court improperly considered extrinsic evidence in construing the will, and (2) the proper construction of the will was that he should receive the IPERS account. The estate contends (1) the district court properly considered extrinsic evidence, and (2) the plain language of the will supports the result reached by the district court.

SCOPE OF REVIEW. A declaratory judgment to construe or interpret a decedent's will is tried in equity and our review is de novo. *In re Estate of Kruse*, 250 N.W.2d 432, 433 (Iowa 1977); *In re Estate of Miguet*, 185 N.W.2d 508, 513

(Iowa 1971). In a de novo review we must make findings of fact anew; however, when considering the credibility of the witnesses we give weight to the fact findings of the trial court, although we are not bound by them. *Russell v. Johnston*, 327 N.W.2d 226, 228 (Iowa 1982).

BEQUEST TO VINCENT. Vincent argues the clear and unambiguous intent of the will is that Ronald intended to leave the IPERS account to him and that it was made as a specific bequest. He further contends that the district court erred in considering the testimony of Jay Stein as to statements decedent allegedly made after the will was executed.

The estate contends that Ronald's will was not ambiguous, as its plain language establishes Ronald did not intend to leave the IPERS funds to Vincent, but if the will is ambiguous, the court properly considered evidence of the relationship with Vincent, and Ronald clearly intended the IPERS to go to his estate and not to Vincent.

Vincent points out that the IPERS account is a specific and identifiable asset that cannot be confused with other assets, the fact that Ronald phrased the bequest in the past tense does not obviate the intent, and while the will's wording may not be ideal, taking the will as a whole one can determine Ronald's intent and his intent should prevail.

A specific devise is "a bequest of a particular thing that can be distinguished from others of the same kind." *In re Estate of Hill*, 258 Iowa 1186, 1190, 140 N.W.2d 711, 713 (1966). It is "a designated article or specific part of the testator's estate which is identified and distinguishable from other things of

the same kind, which may be satisfied by delivery of the specific thing or portion." *In re Estate of DeVoss*, 474 N.W.2d 542, 544 (Iowa 1991) (citations omitted). We agree with Vincent that the IPERS account is a specific and identifiable asset that cannot be confused with other assets.

The primary goal in interpreting a will is to discern the intent of the testator. *In re Estate of Hoagland*, 203 N.W.2d 577, 580 (Iowa 1973). This intent is determined by the language used in the will, the scheme of distribution, the circumstances surrounding the will's execution, and the existing facts. *In re Estate of Rogers*, 473 N.W.2d 36, 39 (Iowa 1991); *In re Estate of Anderson*, 359 N.W.2d 479, 480 (Iowa 1984). The question is not what the testator meant to say, but what the testator meant by what the testator did say. *Rogers*, 473 N.W.2d at 39. We consider the entire will and strive to give each part meaning and effect. *Id.* We resort to technical rules or canons of construction only when the will is ambiguous or conflicting or the testator's intent is uncertain. *Anderson*, 359 N.W.2d at 480. With these principles in mind we now turn to an examination of the meaning of the section of the will set forth above. *See In re Estate of Thompson*, 511 N.W.2d 374, 377 (Iowa 1994).

Extrinsic evidence may be considered by the court in resolving problems of ambiguity. *Anderson*, 359 N.W.2d at 481. Extrinsic evidence is not admissible to vary, contradict, or add to terms of the will or to show an intention different from that disclosed by the language of the will. *In re Estate of Kalouse*, 282 N.W.2d 98, 104 (Iowa 1979). Thus, extrinsic evidence may be considered only on issues that are in doubt.

Keeping in mind the settled principles, our first inquiry must be to determine whether the will is ambiguous. *Rogers*, 473 N.W.2d at 39; *In re Estate of Kiel*, 357 N.W.2d 628, 631 (Iowa 1984). In doing so, we also recognize that prior cases are normally of limited value in will-construction cases. *In re Estate of Rahfeldt*, 253 Iowa 72, 75-76, 111 N.W.2d 303, 305 (1961). This is because each will-construction case normally involves a fact situation peculiar to the facts of that case. *See Thompson*, 511 N.W.2d at 378.

> There are two kinds of ambiguity, patent and latent. A patent ambiguity is that which appears on the face of the will and arises from the phraseology or the defective, obscure, doubtful, or uncertain language. It arises upon the reading of the will. A latent ambiguity exists where the language of the instrument does not lack certainty but some extrinsic or collateral matter outside the will renders the meaning obscure and uncertain.

In re Estate of Lepley, 235 Iowa 664, 670, 17 N.W.2d 526, 259 (1945).

The estate acknowledges the will may be considered patently ambiguous because it has been susceptible to various interpretations. Patent ambiguity occurs when the meaning of a will is, on its face, uncertain, doubtful, or obscure. *Rogers*, 473 N.W.2d at 39.

In ascertaining the intent of the testator, which is the guiding light in will interpretation, we rely primarily on the language contained in the will; however, the substance and intent, rather than the words, are to control. To ascertain the substance and intent we examine the entire will. *Russell v. Johnston*, 327 N.W.2d 226, 229 (Iowa 1982). Each part should be considered in relation to every other part and all provisions given effect unless clearly in conflict with some positive rule of law. *In re Estate of Logan*, 253 Iowa 1211, 1217, 115 N.W.2d 704, 705 (1962).

After applying these principles, we conclude that the will should have been construed as granting the IPERS account to Vincent. Paragraph III by its terms contemplated that Vincent would receive that account. To accept the district court's reasoning would require us to disregard entirely the language that showed Ronald believed he had given his IPERS to Vincent at the time the will was drafted.[6] No part of the will should be discarded without sound reason. *See In re Estate of Graham*, 690 N.W.2d 66, 72 (Iowa 2004). The Iowa Supreme Court has noted a growing disinclination to allow a testator's intent to be frustrated by a technical but obvious mistake in draftsmanship. *In re Estate of Anderson*, 359 N.W.2d 479, 481 (Iowa 1984). If a testamentary provision is reasonably susceptible to two constructions, one making it void or inoperative, the other rendering it valid and effective, the latter must be accepted, the former rejected. *Miguet*, 185 N.W.2d at 513.

Decedent's will indicates Vincent had been given the IPERS account. In order to give proper respect to decedent's intent we may determine that he made a gift "by necessary implication" from his will. *See Porter v. Porter*, 286 N.W.2d 649, 654 (Iowa 1979); *In re Estate of Fawcett*, 370 N.W.2d 837, 838 (Iowa Ct. App. 1985). A gift by necessary implication occurs when a testator's will clearly reveals a general plan or intention as to the disposition of his property, and a situation arises that is not within the express language of the will, such as we

[6] The district court reasoned, "Decedent did not specify anywhere in the Will that it was his intent for [Vincent] to receive the IPERS funds." We respectfully disagree. Paragraph III states that the decedent had "adequately provided for my son, Vincent . . . through . . . my . . . IPERS account" (and certain other assets), and therefore the balance of his estate would go elsewhere. We view this as a clear statement of Ronald's intent that Vincent receive the IPERS account.

have here. *See In re Estate of Wagner*, 507 N.W.2d 711, 714 (Iowa Ct. App. 1993). Therefore, such a general plan may be regarded as existing but incompletely expressed, the failure to provide for the situation inadvertent rather than intentional, and a gift may be implied for the purpose of completing the general plan. *Id.*

Ronald clearly indicated in his will not only that he had a desire to provide adequately for Vincent through the IPERS account and other listed accounts but that he had done so. Clearly when the will was signed Ronald had the belief that by passing the IPERS to his estate his son would receive it. He used the same language in the subsequent IPERS beneficiary designation, which indicates he intended for the IPERS account to be considered given to Vincent.

Because we reverse the district court's ruling that the IPERS account should pass to the residuary beneficiaries rather than Vincent, we need not determine whether the district court erred in considering Stein's testimony. However, we note that Stein admitted he could not speak to Ronald's state of mind when he executed the will. Stein's testimony related more generally to Ronald's ongoing disappointment with his son. This testimony, in our view, is insufficient to overcome the clear expression of intent in the words of paragraph

III.[7] Accordingly, we reverse the decision of the district court and remand this case for entry of an order consistent with this opinion.[8]

REVERSED AND REMANDED.

Mansfield, J. concurs; Eisenhauer, J., dissents.

[7] The issue here is not whether Ronald was disappointed in Vincent. After all, he declined to make Vincent, i.e., his next of kin, the residuary beneficiary. However, the ultimate question here is whether Ronald was *so* disappointed in Vincent as not to give him the IPERS account. Here Stein's testimony is too general to shed light on that question.

[8] Our dissenting colleague asserts that under our analysis, Ronald could never have changed the beneficiary of his IPERS account without changing his will first. We disagree. If Ronald had designated another family member (or members) by name as the beneficiary of his IPERS account, this would be a different case. In that event, the IPERS account would presumptively pass to that beneficiary (or beneficiaries) without going through the estate. However, in this instance Ronald made his estate the beneficiary of his IPERS account. This then requires us to examine the terms of the will to determine the intended recipient of that asset.

EISENHAUER, J. (dissenting)

I dissent. I would affirm the decision of the trial court and agree: "Decedent did not specify anywhere in the Will that it was his intent for [his son] to receive the IPERS account funds." Under the majority's analysis Ronald could never have changed the beneficiary of any of the listed funds without changing his will.

I would find, as the trial court did, Ronald's will is not ambiguous. Ronald's will directed all the property in his estate be converted to cash and, after paying for a party described in the will, the remaining cash be divided one-half to his mother and one-half, evenly, to his two brothers. The will specifically stated: "Having adequately provided for my son, Vincent Christopher Prosser, through the insurance policy covering me as an Iowa City public employee, my TIAA/CREF account, IPERS account, and personal retirement fund, the balance thereof remaining after the expenses of the said party are paid shall be divided . . . ." Whether Ronald left any of the listed funds to his son to "adequately" provide for him was dependent on Ronald naming his son as a beneficiary of those funds.

The trial court found the history of beneficiary designations helpful if, alternatively, the language in the will regarding the IPERS account is found to be ambiguous. I agree. Ronald did not name his son as beneficiary of the IPERS fund. Instead, on two separate occasions he named his estate. At the time Ronald executed the will the IPERS beneficiary was his estate and, perhaps, he intended to change the beneficiary to his son at some future time. However,

when Ronald designated the IPERS beneficiary after the will's execution, he once again designated his estate. Prior to both of the IPERS beneficiary designations, Ronald named his son, and not his estate, the beneficiary of his TIAA/CREF account. He also named his son as beneficiary of his employer-sponsored life insurance policy and designated his estate as the secondary beneficiary. Accordingly, Ronald knew the distinction between the beneficiary designations and was aware he could have chosen to name his son directly. He did not.